No. 80427-3

ALEXANDER, C.J. (dissenting)—I dissent from the majority's determination that all of Ms. Violet Alvarez's statements to Officers Nolan Wentz and Michael Kryger were testimonial. I would hold that Ms. Alvarez's initial statements to the police officers were nontestimonial and, therefore, admissible under the excited utterance exception to the hearsay rule. Accordingly, I believe there is sufficient evidence to support the jury's guilty verdicts. Thus, I would affirm the Court of Appeals' decision upholding Duane Koslowski's convictions.

CONFRONTATION CLAUSE

In holding that all of Ms. Alvarez's statements to Officers Wentz and Kryger were testimonial, the majority incorrectly applies the test announced in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and subsequently applied by this court in *State v. Ohlson*, 162 Wn.2d 1, 168 P.3d 1273 (2007).

The four-factor "primary purpose test" announced in *Davis* "requires courts to

make an objective appraisal of the interrogation itself." *Id*. at 11. "Characteristics to consider when objectively assessing the circumstances of the interrogation include the timing of the statements, the threat of harm, the need for information to resolve a present emergency, and the formality of the interrogation." *Id.* at 15. "Th[e] list of factors is not necessarily exclusive, nor does any one factor necessarily determine the purpose of the interrogation in every case." *Id.* at 22 (Chambers, J., concurring).

The focus of the primary purpose test is on the declarant's statements. *Davis*, 547 U.S. at 822 n.1. As we noted in *Ohlson*, "'of course . . . it is in the final analysis the declarant's statements, *not the interrogator's questions*, that the Confrontation Clause requires us to evaluate.'" *Ohlson*, 162 Wn.2d at 11 (emphasis added) (alteration in original) (quoting *Davis*, 547 U.S. at 822 n.1).

In *Davis*, the United States Supreme Court emphasized that "'we do not hold . . . that *no* questions at the scene will yield nontestimonial answers.'" *Ohlson*, 162 Wn.2d at 14 (quoting *Davis*, 547 U.S. at 832). As the Court explained, "'"[o]fficers called to investigate . . . need to know *whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.*" Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.'" *Ohlson*, 162 Wn.2d at 14 (quoting *Davis*, 547 U.S. at 832 (alteration in original) (quoting *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004))).

Applying the test from *Davis* and the precedent of *Ohlson* to the record before

us, I would hold that Ms. Alvarez's initial statements were nontestimonial.[1] My analysis distinguishes Ms. Alvarez's "initial statements" to Officers Wentz and Kryger from the "subsequent statements" she made to the officers. The record shows that she made her initial statements immediately or shortly after the officers' respective arrivals on the scene.[2] These statements include those made between the moment Officer Wentz arrived and the point where the officers had Ms. Alvarez walk them through the scene. *See* 3 Verbatim Report of Proceedings (VRP) (Jan. 29, 2003) at 321-25, 331-37; *cf. Ohlson*, 162 Wn.2d at 18 (describing similar crime scene statements made by victims to a police officer as the information "necessitated" by the officer's "initial triage of the situation."). Her subsequent statements include, for example, those made to Officer Kryger during his inventory of the residence. *See, e.g.,* 3 VRP (Jan. 29, 2003) at 337-38 (Ms. Alvarez indicated to Officer Kryger that a jewelry box and pillowcase were

[1]The majority discusses the "limited" nature of the record before us. *See* majority at 13. The record is sufficient, however, to support the conclusion that Ms. Alvarez's initial statements were nontestimonial. In *Ohlson*, we held that the victims' statements were nontestimonial without citing or quoting the questions asked, exactly, of the victims by a police officer. *Ohlson*, 162 Wn.2d at 4-19. Moreover, a review of the record in *Ohlson* reveals that it lacked the same details that the majority claims are missing from the record here. *Compare* majority at 13, *with State v. Ohlson*, No. 78238-5, VRP (June 30, 2004) at 88-94 (Wash. Sup. Ct. Oct. 18, 2007).

[2]Officer Wentz testified that he arrived at Ms. Alvarez's residence "[a]bout two minutes" after receiving a call. 3 VRP (Jan. 29, 2003) at 321. He said that his questioning took "[n]ot very long" and occurred within a time frame of "[j]ust a few minutes" after his arrival, and that Ms. Alvarez started making statements to him "right away." 1 VRP (Jan. 13, 2003) at 113, 116; 3 VRP (Jan. 29, 2003) at 322. Officer Kryger testified that it took him "approximately six or seven minutes" to get to Ms. Alvarez's residence after receiving a call. 3 VRP (Jan. 29, 2003) at 331. He indicated that upon his arrival he contacted Ms. Alvarez inside the home and she told him what happened.

missing.). Significantly, the record indicates that Ms. Alvarez's statements concerning the gun[3] were part of her initial statements to both officers. *Id.* at 323, 333.

Beginning with the first factor of the primary purpose test, with respect to the timing of Ms. Alvarez's initial statements, they were made to Officers Wentz and Kryger an "evidently short" amount of time after the robbers left her residence and within minutes of the 911 call. Majority at 14. Ms. Alvarez called 911 after hearing the robbers drive away and freeing herself from the wire ties, and Officer Wentz arrived at her home two minutes later in response to the call. Upon arriving, Officer Wentz began making his initial inquiries. Similarly, in *Ohlson*, the victims' statements were made "within minutes of the assault" and the investigating officer's initial inquires began within five minutes of the 911 call. *Ohlson*, 162 Wn.2d at 17. Like the victims in *Ohlson*, while Ms. Alvarez "was not 'speaking about the events *as they were actually happening*,' the statements were made contemporaneously with the events described." *Id*. (quoting *Davis*, 547 U.S. at 827).

The majority incorrectly defines the first factor of the *Davis* test as "whether the speaker was speaking about events as they actually occurred or describing past

[3]During the trial, Officers Wentz and Kryger both testified that Ms. Alvarez stated that one of the robbers had a gun. 3 VRP (Jan. 29, 2003) at 323 (Officer Wentz testified that Ms. Alvarez told him, "As she was gathering her groceries three men from that car approached her and one had a gun. He took the gun and pushed it in her side and then in English directed her to go into the house."), 333 (Officer Kryger testified that Ms. Alvarez "indicated that the subject had a handgun and had put it into her side."), 344 (Officer Kryger testified that Ms. Alvarez described "one subject with the gun who had brought her into the house."), 348 (Officer Kryger testified that Ms. Alvarez "had a strong belief there was a gun.").

events." Majority at 14. In *Ohlson*, this court rejected such narrow analysis as being "inconsistent with the Court's emphasis [in *Davis*] . . . [, which] supports a more nuanced approach when considering the timing of a statement than merely noting whether a declarant phrased his or her statement using past or present tense." *Ohlson*, 162 Wn.2d at 14-15 (citation omitted). We explained that "[i]nformation essential to assessing a situation will necessarily sometimes include recitations of events that occurred in the past, if only by a matter of minutes." *Id.* at 14. Here, Ms. Alvarez was reciting events that occurred in the past, but only by a matter of minutes.

Insofar as the second factor of the primary purpose test is concerned, whether a reasonable listener would recognize that Ms. Alvarez was facing a threat of harm, this case falls between *Ohlson* and *Hammon*. *See Davis*, 547 U.S. at 829-30 (victim in *Hammon* told police upon their arrival that she was fine and there was no immediate threat to her person); *Ohlson*, 162 Wn.2d at 18 (circumstances indicated assailant might return to the scene). I believe this factor was met until a reasonable listener, under these circumstances, would have recognized that Ms. Alvarez did not require medical assistance and that there was no reasonable threat of physical harm to her.

The majority claims that "it is highly significant that the officers were present to protect Ms. Alvarez." Majority at 22 n.10 (citing *Davis*, 547 U.S. at 830). Although the majority makes this statement in analyzing the third factor, the presence of officers on the scene is relevant to our analysis under the second factor. *See Ohlson*, 162 Wn.2d at 18. We distinguished *Ohlson* from *Hammon* on this basis, stating that even though

the responding officer was present, "unlike Hammon, the police could not 'actively separate[]' Ohlson from D.L. and 'forcibly prevent[]' Ohlson from harming D.L.—Ohlson's identity and location were unknown." *Id*. (alteration in original) (quoting *Davis*, 547 U.S. at 830). For the same reason, this case may be distinguished from *Hammon*: though Officers Wentz and Kryger were present, they could not "actively separate[]" the robbers from Ms. Alvarez, and could not "forcibly prevent[]" the robbers from harming Ms. Alvarez—the robbers' identity and location were unknown. *Davis*, 547 U.S. at 830. Accordingly, the presence of the officers in this case does not support the majority's conclusion with regard to the third factor. Rather, it supports my conclusion regarding the second factor.

The third factor, as noted above, is whether Ms. Alvarez's initial statements to Officers Wentz and Kryger were necessary to resolve an ongoing emergency. In *Ohlson*, we held that an ongoing emergency existed at least until the first responding officer arrived at the scene and completed what was described as her "initial triage" of the situation. *Ohlson*, 162 Wn.2d at 18. This process included the officer's initial inquiries to the victims seeking information essential to determining whether there was ongoing danger to the victims or any threat to the community or the officer and her fellow officers. *Id.* (holding the initial triage necessitated the information obtained from the victims). Here, when Officers Wentz and Kryger arrived at Ms. Alvarez's residence all that was known about the situation was what the 911 call reported—that a home invasion robbery involving three suspects had just occurred and the suspects had fled

in a vehicle. 3 VRP (Jan. 29, 2003) at 321, 331. It was, accordingly, the officers' immediate top priority to complete their initial assessment of the situation and determine whether there was an ongoing danger to Ms. Alvarez or any threat to the community or themselves and their fellow police officers. *See Ohlson*, 162 Wn.2d at 18; *see also* 1 VRP (Jan. 13, 2003) at 113 (Officer Wentz's initial inquiries to Ms. Alvarez were made for the purpose of "get[ting] as much information as [he] could to give to the other officers in the field."). Thus, under *Ohlson*, at least until Officers Wentz and Kryger completed their initial assessment of the situation, which necessitated the information obtained from Ms. Alvarez's initial statements, the situation presented an ongoing emergency.

The majority's analysis under this factor emphasizes that there was no evidence the police would encounter violent individuals in Ms. Alvarez's residence or the vicinity. Majority at 19. However, with regard to the location of the perpetrator when the declarant's statements are made, "the critical consideration is not whether the perpetrator is or is not at the scene, but rather whether the perpetrator poses a threat of harm, thereby contributing to an ongoing emergency." *Ohlson*, 162 Wn.2d at 15. Thus the majority's emphasis is misplaced.

The majority concedes that an armed suspect who is at large may constitute an ongoing emergency "when considered with other evidence." Majority at 20. I believe the "other evidence" in this case, added to the at large status of the suspects, demonstrates that there was an ongoing emergency when Ms. Alvarez made her initial

statements to Officers Wentz and Kryger. In fact, at least one of the cases cited by the majority supports this conclusion. Majority at 21 (citing *United States v. Arnold*, 486 F.3d 177 (6th Cir. 2007)). In *Arnold*, the court held that an ongoing emergency existed where a witness told police that a suspect had pulled a gun and threatened to kill her. *Arnold*, 486 F.3d at 190. "Other evidence" noted by the court included (1) the armed suspect remained at large, (2) the suspect did not know that the witness had called 911, and (3) neither the witness nor the officers knew whether the suspect remained armed and in the nearby vicinity. *Id.* Similarly, the "other evidence" in this case includes (1) when Officer Wentz and Kryger arrived, the robbers remained at large and one of them was armed, (2) there is no evidence that the robbers knew Ms. Alvarez called 911, and (3) neither Ms. Alvarez nor the officers knew whether the robbers remained armed and in the vicinity. Thus, as in *Arnold*, there was an ongoing emergency in this case. *See also State v. Warsame*, 735 N.W.2d 684, 694 (Minn. 2007) (holding assailant's flight from crime scene constituted ongoing emergency, where victim told police that alleged assault involved a knife).

The majority reaches the opposite conclusion with regard to this factor, in part because there is no evidence that the robbers' vehicle was spotted in the area after the officers arrived. Majority at 22 n.10. Nothing in *Davis*, however, suggests that whether statements are testimonial or nontestimonial can be determined in hindsight by reference to what is learned subsequent to the statements being made. Rather, as our analysis in *Ohlson* demonstrates, we must objectively consider the statements at the

time they were made. *See Ohlson*, 162 Wn.2d at 18 (considering what was known and unknown, objectively viewing the course of events, when the officer arrived on the scene). In *Ohlson*, hindsight revealed that the assailant did not return to the scene after the officer arrived. *Id*. at 6, 18-19. Nevertheless, we concluded that there was an ongoing emergency, in part because when the officer arrived on the scene "all that was known about the situation was [that] a speeding vehicle was trying to hit some juveniles." *Id*. at 18 (also concluding there as a threat of harm to the victim, in part because there was no way to know whether the assailant might return to the scene). Thus, the majority's analysis conflicts with *Ohlson* in this regard because when Ms. Alvarez made her initial statements to the officers, objectively viewing the course of events, all that was known was that a robbery had just occurred and there was no way to know whether the robbers might return.

Finally, as to the fourth factor, the level of formality, the majority concedes that "the questioning at her home was certainly less formal than the police station taped interrogation in *Crawford*." Majority at 22-23. The circumstances were also less formal than those in *Hammon*. There, the victim told police upon their arrival that she was fine and there was no immediate threat to her person, the official interrogation "was conducted in a separate room" from the assailant, the victim "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed," and the interrogation "took place some time after the events described were over." *Davis*, 547 U.S. at 830. In contrast, Ms. Alvarez's interrogation was

conducted shortly after the underlying robbery occurred while she was frightened, upset, and extremely emotional.

For the above reasons, I conclude that the initial statements made by Ms. Alvarez to Officers Wentz and Kryger were nontestimonial. The circumstances of the interrogation objectively indicate that the primary purpose of the officers' initial inquiries was to enable police assistance to meet an ongoing emergency. I would hold, therefore, that the trial court's admission of Ms. Alvarez's initial statements did not violate Koslowski's Sixth Amendment right to confrontation.

EXCITED UTTERANCE

Having concluded that Ms. Alvarez's initial statements are nontestimonial, I next consider whether those statements fit within a specific hearsay exception. The State argues that the trial court properly admitted Ms. Alvarez's statements as excited utterances. I agree.[4]

"This court reviews for abuse of discretion a trial court's decision to admit a hearsay statement as an excited utterance." *Ohlson*, 162 Wn.2d at 7-8 (citing *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992)). We will not reverse the trial court's decision "'unless we believe that no reasonable judge would have made the same ruling.'" *Id*. at 8 (quoting *Woods*, 143 Wn.2d at 595-96).

[4]At a pretrial hearing, Koslowski's attorney conceded there was an excited utterance by Ms. Alvarez and indicated he did not object to her statements being admitted. 1 VRP (Jan. 13, 2003) at 119-20. Neither did he object to their admission at trial. 3 VRP (Jan. 29, 2003) at 320-49.

ER 803(a)(2) indicates that a statement is not excluded as hearsay if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." We have previously stated that three "closely connected requirements" must be satisfied for a hearsay statement to qualify as an excited utterance, including, (1) a startling event or condition must have occurred, (2) the declarant must have made the statement while under the stress or excitement of the startling event of condition, and (3) the statement must relate to the startling event or condition. *Ohlson*, 162 Wn.2d at 8 (citing *Woods*, 143 Wn.2d at 597; *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992)). The first and third requirements are met here because the underlying robbery clearly constituted a startling event and Ms. Alvarez's initial statements related to the robbery.

As for the second requirement, it is met because Ms. Alvarez remained under the stress caused by the underlying assault when she made her initial statements to Officers Wentz and Kryger. *See* 3 VRP (Jan. 29, 2003) at 322, 332 (Officers described Ms. Alvarez as "extremely emotional, very upset," "very pale," with a "very shaky voice" and "very, very frightened, scared."). As noted, her initial statements were made to the officers immediately or shortly after their respective arrivals. 1 VRP (Jan. 13, 2003) at 113, 116; 3 VRP (Jan. 29, 2003) at 322. Although the precise amount of time between the underlying robbery and the time of her initial statements is not entirely clear from the record, it is not an issue here because it is apparent that a prolonged period of time had not passed. *See Woods*, 143 Wn.2d at 599-601 (statements made 45 minutes

after assailant left the crime scene were properly admitted); *see also State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (statements made seven hours after rape deemed properly admitted upon finding of "continuing stress" between time of rape and statement).

The three requirements of the excited utterance hearsay exception are satisfied. Accordingly, I would hold the trial court properly admitted Ms. Alvarez's initial statements as excited utterances.

SUFFICIENCY OF THE EVIDENCE

Because I would hold Ms. Alvarez's initial statements were properly admitted by the trial court, I must, finally, consider whether there is sufficient evidence to support Koslowski's convictions. "Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). "Circumstantial evidence and direct evidence are equally reliable." *Id.* (citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). "This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Id.* at 874-75 (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

To uphold each of Koslowski's convictions, there must be sufficient evidence that Koslowski was armed. *See* majority at 22 n.10. As noted, Ms. Alvarez's initial

statements included her statements concerning the gun. 3 VRP (Jan. 29, 2003) at 323, 333. Additional evidence indicating Koslowski was armed includes Ms. Heather Killion's testimony regarding Koslowski's gesture of a gun and evidence that Koslowski attempted to rob another person with a firearm the following day. In light of these facts, it is my judgment that there is sufficient evidence that Koslowski was armed to support his convictions. I would, therefore, affirm the jury's guilty verdicts for first degree robbery, first degree burglary, and first degree unlawful possession of a firearm.[5]

CONCLUSION

For the aforementioned reasons, I dissent from the majority's determination. In my view, we should uphold the decision of the Court of Appeals affirming Koslowski's convictions.

[5]I reach this holding without deciding whether Ms. Alvarez's subsequent statements were testimonial or nontestimonial and without analyzing them under the excited utterance exception to the hearsay rule. However, even if I held her subsequent statements were testimonial or were not excited utterances, and thus erroneously admitted by the trial court, I would affirm Koslowski's convictions under harmless error analysis. *See Ohlson*, 162 Wn.2d at 19 n.4 (violation of confrontation clause subject to harmless error analysis using the "'overwhelming untainted evidence'" test). Specifically, I would hold that there is overwhelming untainted evidence, including Ms. Alvarez's initial statements, to support Koslowski's convictions and I am convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the admission of her subsequent statements.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Charles W. Johnson

Justice James M. Johnson